SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974 Case No. 11113-2012

BETWEEN:

SOLICITORS REGULATION AUTHORITY Applicant

and

RICHARD CAPLAN Respondent

Before:

Mr D. Glass (in the chair)
Mr J. Astle
Mr M. Palayiwa

Date of Hearing: 11 & 12 February 2014

Appearances

Mr Jonathan Goodwin, solicitor advocate, of Jonathan Goodwin Solicitor Advocate Ltd, 17e Telford Court, Dunkirk Lea, Chester Gates, Chester CH1 6LT for the Applicant.

Mr Alan Tunkel, counsel, of 3 Stone Buildings, Lincoln's Inn, London WC2A 3XL for the Respondent, who was present.

JUDGMENT

Allegations

1. The allegations against the Respondent, Mr Richard Caplan, made in a Rule 5 Statement dated 20 December 2012, were that he:

1.1 Failed to maintain professional indemnity insurance for his firm, contrary to Rules 4, 5 and 12 SRA Indemnity Insurance Rules 2011 ("the Indemnity Rules"), Principles 6, 7 and 8 of the SRA Principles 2011 ("the Principles") and Outcome O7.2 of the SRA Code of Conduct 2011 ("the Code");

1.2 Conducted client matters and took new instructions after 31 March 2012 when he knew his firm to have no professional indemnity insurances, contrary to Principles 2, 4 and 5 of the Principles and Outcomes O1.2 and O1.8 of the Code;

1.3 Failed to notify clients that his firm was operating without professional indemnity insurances, contrary to Principles 2, 4 and 5 of the Principles and Outcomes O1.2 and O1.8 of the Code;

1.4 Failed to pay ARP premiums for the indemnity year 2010/11 and 2011/12 which he knew were required to be paid by 31 March 2012 contrary to Rule 10 of the Indemnity Rules, Principles 7 and 8 of the Principles and Outcome O11.2 of the Code;

1.5 Withdrawn

2. The allegations against the Respondent made in a Rule 7 Statement dated 3 October 2013, were that:

2.1 He misled Royal National Institute for Blind People ("RNIB") (being a beneficiary in respect of a legacy of the residuary estate of Mrs MW) on 17 August 2012, by providing them with an inaccurate Will and/or Statement of Account for Mrs MW, which suggested that RNIB were due to receive a reduced legacy from the residuary estate in breach of all, alternatively any of Principles 2 and 6 of the SRA Principles 2011 ("the Principles"). Further, or alternatively, the Respondent failed to achieve Outcome O11.1 of the SRA Code of Conduct 2011 ("the Code");

2.2 He failed to account to RNIB for the balance of the legacy properly due to them from the residuary estate of Mrs MW in the sum of £204,676.44, in breach of Rules 1.02 and 1.06 of the Solicitors Code of Conduct 2007 ("the SCC") in the period up to 5 October 2011 and/or from 6 October 2011 he breached all, or alternatively, any of Principles 2, 6 and 10 of the Principles. Further, or alternatively, he failed to achieve outcome O11.1 of the Code;

2.3 He misappropriated client monies and in so doing acted contrary to Rules 1.02 and 1.06 of the SCC.

2.4 Although dishonesty was not an essential ingredient of the allegations, it was alleged that the Respondent was dishonest in respect of allegations 2.1, 2.2 and 2.3 in that:-

2.4.1 By letter dated 17 August 2012 he provided a copy of a Will dated 18 July 2007 and Statement of Account to RNIB, which were materially different to the documents submitted to Probate and provided to the other residuary beneficiary, St Dunstan's; and/or

2.4.2 He failed to account to the RNIB for the balance of the legacy due to them under the Will submitted to Probate in the sum of £204,676.44; and/or

2.4.3 He misappropriated client's funds, in that he made a payment by cheque dated 23 July 2010 in the sum of £204,676.44 to HMRC from funds held in relation to the estate of the late Mrs W.

Documents

3. The Tribunal reviewed all of the documents submitted by the parties, which included:

Applicant:-

- Application dated 20 December 2012
- Rule 5 Statement, with exhibit "SD1", dated 20 December 2012
- Rule 7 Statement, with exhibit "JRG1", dated 3 October 2013
- Schedule of costs

Respondent:-

- Response to Rule 5 Statement, with supporting documents, 23 January 2013
- Response to Rule 7 Statement, dated 12 December 2013
- Respondent's submissions, dated 10 February 2014 with authorities

Preliminary Matter – Respondent's submissions

4. Mr Goodwin informed the Tribunal that he had received the Respondent's skeleton argument whilst travelling to London on the afternoon of 10 February. The skeleton contained what Mr Goodwin described as novel points, which did not feature in the Respondent's response, in particular an argument concerning a distinction to be drawn between the Respondent's role as a solicitor and his role as executor of the estate of the later Mrs MW. Mr Goodwin informed the Tribunal that he had done his best to consider the matters raised, and he did not seek an adjournment or more time today.

5. In response, Mr Tunkel noted that there had been no direction from the Tribunal as to earlier service of a skeleton/submissions and that whilst the Response was fact-based, the submissions included matters of law. It was normal to exchange skeleton arguments the day before a hearing, in other proceedings.

6. The Tribunal noted the position and was satisfied that the matter could proceed.

Factual Background

7. The Respondent was born in 1952 and was admitted as a solicitor in 1977. His name remained on the Roll of solicitors at the date of the hearing, but he did not hold a Practising Certificate.

8. At the material times (until May 2012) the Respondent practised on his own account as Caplans Solicitors at 12 Peterborough Road, Harrow HA1 2BB and then, from about December 2010, at 1-3 Tyburn Lane, Harrow HA1 3AG ("the Firm").

9. The Applicant commenced a Forensic Investigation Unit inspection of the Firm on 3 May 2012 following concerns that the Firm was operating and the Respondent was practising without the benefit of valid professional indemnity insurance ("PII") obtained either on the open market or through the Assigned Risk Pool ("ARP"). A report was produced dated 4 May 2012 ("the FI Report"). On 18 May 2012 the Applicant's Panel of Adjudicators Sub-Committee considered the FI Report and resolved to intervene into the Firm. The intervention was effected on 22 May 2012. Thereafter, the Respondent used a correspondence address at 2nd Floor, Queen's House, Kymberley Road, Harrow HA1 1US and his home address.

10. There was no substantial dispute about the facts set out in the Rule 5 or Rule 7 Statements.

Matters in the Rule 5 Statement

11. The Firm was granted membership of the ARP for the indemnity year 2010/11, for which the outstanding premium payable was £43,400 and remained in the ARP for part of the indemnity year 2011/12, for which the premium payable was £64,800.

12. When the Firm entered the ARP in 2010 the premium, based on the Firm's gross fees for the year to 30 September 2010, was calculated at £191,374.92 plus Insurance Premium Tax ("IPT"). The Respondent applied for a waiver and on 23 September 2011 an Adjudicator of the Applicant determined that the premium should be reduced to £108,000 plus IPT and the Respondent was given until 31 March 2012 to pay. The Respondent's application for the waiver was based on "exceptional circumstances"; his position was that the Firm was unable to obtain cover on the open market due to difficulties which had arisen over the conduct of a former principal of the Firm, Ms J, who had left in 2006 and established her own firm.

13. The Respondent applied to remain in the ARP for the 2011/12 indemnity year; membership of the ARP was not automatically granted. That application was initially refused but on 19 October 2011 a Panel of Adjudicators Sub-Committee granted the application and permitted the Respondent's Firm to remain in the ARP until 31 March 2012, with a premium for the 6 month period from 1 October at £90,750 plus IPT. The Panel determined that there was a greater likelihood of the Respondent being able to comply with the payment terms under the waiver if he was able to continue to practise.

14. The Respondent applied for a waiver of the premium, citing exceptional circumstances (as above). On 24 January 2012 the Applicant granted a waiver such that the premium payable became £64,800 plus IPT.

15. The Respondent was required by the terms of the waiver to pay the outstanding premium for 2010/11 and the premium for the 6 months to 31 March 2012 by 31 March 2012. The required sums were not paid, so the Firm ceased to be a member of the ARP after 31 March 2012. The Respondent did not obtain open market insurance with effect from 1 April 2012. Accordingly, the Firm was uninsured from 1 April 2012. The Applicant referred to Law Society guidance which stated that in these circumstances there were only two options available if the Respondent were to continue to operate his practice: pay for run-off cover for the Firm for the next six years; or be insured by another entity as a successor practice.

16. On 12 April 2012 Capita Insurance Services ("Capita"), who managed the ARP on behalf of the Applicant, wrote to the Respondent stating that the outstanding sums were: £43,400 for 2010/11; £96,195 for 2011/12; and £192,390 for run-off cover, being a total of £331,985. On 20 April 2012 the Respondent wrote to Capita expressing his shock at the figure quoted. The Respondent made a counter-proposal to pay £173,800 in total, by instalments of £2,500 per month. On 24 April 2012 Capita emailed the Respondent rejecting that proposal as the Respondent had been required to pay all outstanding premiums before 31 March 2012 and had not done so.

17. On 1 May 2012 an officer of the Applicant telephoned the Firm and left a message for the Respondent requesting a return of the call and stating that as the Firm had no insurance in place it needed to cease trading.

18. On 3 May 2012 the Respondent wrote to the Applicant requesting a waiver for a further short period and for a reduction of the premium/run-off premium payable. Amongst other matters, the Respondent stated:

> "I have established Caplans Solicitors LLP as my new trading entity and it is to this entity that IRS have given their quotation. Of course the new LLP cannot commence trading without PI insurance."

19. In the period from 1 April 2012, i.e. after the Firm ceased to have insurance, the Firm took on 104 new client matters, which were primarily privately funded conveyancing matters and legally aided criminal matters. Over £16,000 was received into client account on account of costs in those matters. By way of example, the Tribunal was referred to a client care letter dated 10 April 2012 in the matter of Mr and Mrs W, who instructed the Firm in relation to the purchase of a property in Buckinghamshire. The client care letter did not inform Mr and Mrs W that the Firm was not insured. It was not disputed that the Respondent had failed to inform clients that the Firm did not have insurance on or after 1 April 2012.

20. The Applicant's investigation commenced on 3 May 2012 and a FI Report was prepared on 4 May 2012. On 11 June 2012 the Applicant wrote to the Respondent and requested his explanation for the matters raised in the FI Report.

21. On 25 June 2012 the Respondent replied and stated:

21.1 He accepted that the Firm did not have PII after 31 March 2012. This was despite what he described as strenuous attempts to obtain cover at an affordable premium due to the risk of further claims on the unseen "crossover" files which had been conducted by Ms J when she was a partner in the Firm;

21.2 It had transpired that Ms J had been operating a practice within a practice and had created "crossover" files where clients of the Firm were migrated over to her new firm, H Law. Certificates of title were made out in the name of the Firm but the mortgage funds were drawn down to bank accounts belonging to H Law;

21.3 When the lenders wanted to make a claim they relied on the certificates of title and claimed against the Firm. However, as the clients had been migrated to H Law, the Respondent did not have any papers for those matters;

21.4 Having spent 2010/11 in the ARP the Respondent liaised with a broker in a bid to obtain open market cover for 2011/12. The broker had requested as much information as possible on conveyancing transactions completed by the Firm, including re-construction of the crossover files; without the files a proper risk assessment could not be carried out;

21.5 The Respondent understood that H Law was under investigation by the Applicant and so asked the Applicant to conduct an inspection of the relevant crossover files or allow him to conduct a review of them so that a report could be prepared for his broker and potential insurers. It was hoped that having conducted this review he would be in a position to obtain open market cover. The Applicant did not respond positively to this request;

21.6 The Respondent's new entity, Caplans LLP, received an offer of open market cover of £53,000, subject to him obtaining separate run-off cover for the Firm. However, the run-off premium quote from the ARP was, "wholly unaffordable. However, it was understandable because of the uncertain and unquantified risk that further claims might arise from the H Law-Caplans crossover files, which still had not been produced for inspection by the (Applicant)";

21.7 The Respondent stated that PII cover would have been in place for the new entity on 1 April 2012 if the run-off cover had been affordable;

21.8 The Respondent stated that the run-off cover was not affordable because the Applicant failed to assist in obtaining the crossover files from H Law.

22. H Law had ceased trading in 2010 and Ms J had been dealt with by the Tribunal in relation to certain matters, the details of which were not presented to the Tribunal. H Law had not been intervened by the Applicant.

Matters in the Rule 7 Statement

23. By an email dated 21 August 2012, Ms Kerry Ling of the Royal National Institute of Blind People ("RNIB") made a complaint to the Applicant and completed a report form setting out details of the complaint. The facts which emerged were not disputed

by the Respondent, although he denied the allegations which were based on those facts.

24. On 18 July 2007 Mrs MW made a Will ("the Will"). Mrs MW died on 14 December 2009. Under the Will the Respondent was one of the appointed executors; the other executor renounced the appointment and probate was granted during 2010 with the Respondent as sole executor. His Firm dealt with the administration of the estate.

25. The Will provided for certain specific legacies and that the residue of the estate should be divided equally between the National Library for the Blind ("NLB") and St Dunstan's (now known as "Blind Veterans" but referred to in these proceedings as St Dunstan's). The NLB had, by 2010, merged their library service with that of the RNIB and RNIB dealt with all legacy administrations. In this document, NLB and RNIB will be referred to as necessary but for all material purposes the two are interchangeable; there was no doubt that RNIB was the correct organisation to whom the legacy should be paid. NLB's address was in Stockport and RNIB's legacy office was in Peterborough.

26. An estate account sent to St Dunstan's on or about 23 July 2010 (together with a copy of the Will, as admitted to probate) showed that the residue of the estate available for distribution, was £609,352.88 such that the sum due to each of RNIB and St Dunstan's was £304,676.44. A client account cheque dated 23 July 2010 and numbered 703486 in the sum of £304,676.41 was drawn on the client account for the estate and was sent to St Dunstan's. On 4 February 2011 a further cheque was drawn in favour of St Dunstan's in the sum of £1,083.76 which was said to be in respect of interest which had been received into the estate after the initial distribution. It was accepted that St Dunstan's had properly received all the monies due to them under the Will of Mrs MW and that the estate accounts and copy Will showed their entitlement to the sums received.

27. The Firm's client matter file for the estate contained two letters dated 13 July 2010 which bore the reference of the fee earner dealing with the estate, SM. One was addressed to St Dunstan's, referred to a letter from St Dunstan's dated 14 June 2010 and stated that it enclosed a statement of account and cheque in the sum of £304,676.44. It was not disputed that St Dunstan's had, about 10 days later, been sent the appropriate cheque. The second letter was addressed to NLB at the Stockport address and, after naming the deceased, stated:

> "We act for the executor of the above-named deceased who died on 14th December 2009. We enclose a copy of her Will from which you will see that she bequeathed a 50% share of her residuary estate to your charity.
>
> A Grant of Probate has been obtained and the deceased's estate has now been wound up.
>
> Accordingly, we now enclose a statement of account together with a cheque in the sum of £304,676.44 in respect of the monies due to you as set out therein.
>
> Kindly acknowledge receipt."

It appeared from subsequent correspondence that this letter had not been sent, either on the date marked or later.

28. On 21 July 2010 RNIB wrote to the Firm, having learned from the Probate Registry that the Firm was dealing with the estate and that NLB appeared to be a residuary beneficiary. RNIB asked for confirmation of the position and stated that RNIB would be the correspondence point.

29. On 23 July 2010 a cheque (bearing number 703487) was drawn on the client account for the estate for £204,676.44 and was made payable to HMRC. The reverse of the cheque appeared to show it had been received on 27 July 2013 as it bore a stamp which, so far as was clear, read, "Insolvency Service".

30. The Firm's debit/credit slips, by which instructions for the preparation of cheques were given, showed that in relation to cheque "486" on the matter of Mrs MW a cheque for £304,676.44 in favour of St Dunstan's was requested. In relation to cheque "487" the cheque request appeared to show that the sum of £204,676.44 was requested, payable to NLB. Both cheque requests appeared to be dated 23 July 2010.

31. The client ledger for the matter, which may have been reconstructed by the intervention agents, showed the following relevant entries:

12/7/10	HM Revenue	Debit	£204,676.44
12/7/10	Rev Chq Not Hm	Credit	£204,676.44
12/7/10	Nat Library Fo	Debit	£204,676.44
3/8/10	St Dunstan's	Debit	£304,676.44
4/11/10	Nat Lib For Th	Debit	£100,000.00
24/1/11	Cheque stopped	Credit	£100,000.00
25/1/11	Nat Library For The Blind	Debit	£101,083.76
2/2/11	St Dunstan's	Debit	£1,083.76

32. The Firm's client account bank statements showed that cheque number 703487 for £204,676.44 was banked on 29 July 2010 and cheque number 703486 for £304,676.44 was banked on 6 August 2010. A cheque numbered 703757 for £101,083.76 was banked on 7 February 2011 ad cheque number 703784 for £1,083.76 was banked on 14 February 2011.

33. On 25 January 2011 RNIB wrote to the Firm, stating:

> "We refer to our letter of 21 July 2010, a copy of which is enclosed for ease of reference, and would appreciate a reply so that we are able to update our file on this matter.
>
> We look forward to hearing from you."

34. A letter dated 25 January 2011 from the Firm, bearing the reference and signature of the Respondent, was sent to NLB (in Stockport) and was stamped as received by them on 31 January 2011. The letter stated,

"Dear Sirs,

I enclose a cheque in your favour for £101,083.76"

35. On 4 February 2011 RNIB wrote to the Firm, giving the Respondent's reference, and amongst other matters wrote,

"Thank you for your letter of 25 January 2011 from which we were sorry to hear of the death of Mrs W…

We were however grateful to learn that the late Mrs W has generously remembered the work of the NLB in her Will by bequeathing to them a share of her residuary estate. Thank you for enclosing a cheque for £101,083.76 in payment of this bequest…

Please would you let us have a copy of the Will and any codicils to confirm our entitlement. If it is available, a schedule of the assets and liabilities would be very helpful…"

36. On 16 May 2011 RNIB again wrote to the Firm, giving the Respondent's reference and stating, so far as relevant,

"Our file on the above estate has come forward for review and we note that we last heard from you on 25 January 2011 when you sent a cheque for £101,083.76 to NLB.

Please would you let us know the present position in the administration so that we can update our records. Please would you also let us have a copy of the Will and any Codicils to confirm our entitlement. If it is available, a schedule of the assets and liabilities would also be very helpful…"

37. On 4 August 2011 RNIB wrote to the Firm, giving the Respondent's reference and stating,

"We refer to our letter of 16 May 2011 (a copy of which is enclosed for your ease of reference) and would appreciate a reply so that we are able to update our file on this matter.

We look forward to hearing from you."

38. On 14 December 2011 RNIB wrote to the Firm,

"We are sorry to trouble you again on this matter but we do not appear to have received any correspondence from you since 25 January 2011 when you sent a cheque for £101,083.76 to NLB at Stockport…

In order for us to be able to complete and close our file, our auditors require us to have a copy of the Estate Accounts and the Will, in cases where we are a residuary beneficiary. We do appreciate that you may have sent these documents direct to NLB, but unfortunately they cannot locate them. We

> apologise for any inconvenience caused but we would be most grateful if a further copy could be forwarded to us here in the legacy department."

39. On 5 March 2012 RNIB wrote to the Firm, again giving the Respondent's reference, which letter read, so far as relevant:

> "I refer to my conversation with your colleague, B, on 7 February 2012 whereby I telephoned to ask for a copy of the Will and Estate Accounts.
>
> I was advised that as you had closed your file it would take some time for this to be retrieved from storage and that you would be in touch with us in due course.
>
> As it has now been a month since my telephone conversation with your office I wonder whether you are now in a position to provide us with the necessary documentation in order that we may ensure we have received our correct entitlement under the Will of Mrs W and to satisfy the requirements of our auditors and the Charity Commissions.
>
> We look forward to hearing from you by return."

40. On 16 April 2012 RNIB wrote to the Respondent at the Firm, referring to the telephone conversation with B on 7 February and going on to say,

> "It is understood that you have closed your file. Unfortunately we are unable to close our file until we have received the relevant information in order that we may ensure we have received our correct entitlement…
>
> We are sure you are aware that the duties of a Personal Representative include the obligation to "provide a true and perfect inventory and account" of the estate administration to any residuary beneficiary who requests it. A charity entitled to all or part of residue is entitled to receive a set of Estate Account and that the Personal Representatives should ask the Charity to approve the accounts before giving a receipt and discharge to the Personal Representatives.
>
> If a Personal Representative fails to provide Accounts, the beneficiary can apply to the issuing Probate Registry under s25 Administration of Estates Act 1925 for a summons for an account to be produced.
>
> We therefore look forward to receiving the Will and Estate Accounts by return."

41. On 2 July 2012 RNIB emailed St Dunstan's, referring to the fact that RNIB and St Dunstan's were both due a residuary legacy, that RNIB had received a "rather large" cheque at the beginning of 2011 but had had no success in obtaining a copy of the Will of Accounts. RNIB understood that St Dunstan's had received a copy of the Will and Accounts and wondered if St Dunstan's could send a copy to RNIB.

42. On 9 July 2012 St Dunstan's informed RNIB that they had received two cheques, for £304,676.44 on 3 August 2010 and £1,083.76 on 7 February 2011 which, it was explained, was for further interest received from a bank.

43. On 10 July 2012, KL of RNIB telephoned the Respondent. KL's note of that conversation read,

> "Telephoning (the Respondent). (The Respondent) answered the telephone and advised me that he had the file at home and he would provide me with the details we over (sic) the next couple of days.
>
> I thanked him and said we waited hearing from him."

44. On the same day RNIB wrote to the Firm, with the Respondent's reference, stating (so far as relevant),

> "I write further to my previous correspondent and in particular to our telephone conversation today whereby you advised that you would be able to provide me with the further information in the next couple of days…
>
> We note from our file that despite writing to you on 6 occasions since your letter of 25 January 2011 and telephoning your office on 2 occasions we have yet to receive a copy of the Will and Estate Accounts from you. Fortunately our co residuary beneficiary (St Dunstan's) have kindly provided us with a copy of the Estate Accounts and Will you forwarded to them in 2011.
>
> We note from the Will and Accounts that NLB were due to receive a half share of Mrs W's Estate, the other half was bequeathed to (St Dunstan's). We have been informed by (St Dunstan's) that they received a cheque in the sum of £304,676.44 being their half share of the Estate in August 2010. This was then followed by a further cheque in the sum of £1.083.76 being further interest received from…
>
> We have conducted a thorough search of our records and unfortunately can only find a record of NLB receiving the sum of £101,083.76 on 25 January 2011…
>
> There appears to be an outstanding sum of £204,676.44 due to the NLB. However, it may be that this has also been sent to NLB directly. If this is the case we should be most grateful if you could provide us with dates and amounts of the cheques together with copies of the receipts which NLB would have provided in recognition of this generous legacy.
>
> As we are sure you will understand, until we have been able to locate and ensure correct allocation of Mrs W's bequest we are unable to close our file…"

45. On 7 August 2012 the Respondent wrote to RNIB from an address at Kymberley Road, Harrow stating,

> "I picked up your voicemail message yesterday.
>
> I am sorry you have not heard from me recently. Unfortunately my firm, Caplans, was closed in May and I have naturally been undergoing something of an upheaval both personally and professionally.
>
> I have now relocated at this new address as above and will do my best to deal with your outstanding request for information etc in the next 10 days as life gets back to normal.
>
> I trust you will understand."

46. On 17 August 2012 the Respondent wrote to RNIB saying,

> "Further to my letter dated 7 August I have now found the papers I believe you require. Please find enclosed copies of the following:-
>
> 1. Will
> 2. Probate
> 3. Statement of account."

47. The Will which was enclosed with the letter of 17 August 2012 ("the incorrect Will") appeared to have been executed by Mrs MW on 18 July 2007, with the execution page being identical to that of the Will which was admitted to Probate. The terms of the incorrect Will were materially different to those of the Will. In particular, the incorrect Will noted there to be six residuary beneficiaries in equal shares, of whom NLB and St Dunstan's were two such that each appeared to be bequeathed one-sixth of the residuary estate. The Statement of Account enclosed with the letter of 17 August 2012 ("the incorrect Account") showed the balance of the estate for distribution as £606,502.56 and the sum due to each of the six residuary beneficiaries as £101,083.76. There were other differences noted between the correct and incorrect Account and the Will and incorrect Will e.g. as to spelling of the name of Mrs MW, the size of certain specific bequests and the wording used for some standard clauses.

48. By a letter dated 7 January 2013 the Applicant sought the Respondent's explanation of a number of matters, including the difference in the Wills and Accounts provided to RNIB and St Dunstan's. In his response dated 18 January 2013 the Respondent stated,

> "After the intervention, I was being chased by RNIB for information because I was and remain the personal representative of the later Mrs MW. I found and sent to them what has turned out to be a photocopy of an earlier draft of the Will and Statement of Account that I mistakenly believed to be the correct ones – not having the Caplans file available to check this…"

The Respondent went on to state that he was making further enquiries but no further information was provided to the Applicant prior to the commencement of these proceedings. As at the date of the hearing, RNIB had not received the balance of £204,676.44 to which it was entitled.

Witnesses

49. There were no factual matters in dispute, so the Applicant relied on the Rule 5 and Rule 7 Statements and their exhibits.

50. The Respondent gave evidence on his own account and was cross-examined by Mr Goodwin.

Findings of Fact and Law

51. The Applicant was required to prove the allegations beyond reasonable doubt. The Tribunal had due regard to the Respondent's rights to a fair trial and to respect for his private and family life under Articles 6 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Findings relevant to the Rule 5 Statement allegations

52. Allegations 1.1 to 1.4 related to the Respondent's failure to hold and/or pay for PII cover and the Respondent's submissions and explanation in relation to each allegation were similar.

53. The Tribunal found that the Firm continued to operate from 1 April 2012 until the intervention was effected on 22 May 2012 without the benefit of any PII, whether obtained on the open market or through the ARP. There was no doubt that the Firm had continued to operate after 1 April 2012 and that it did not have in place any insurance after that date.

54. The Respondent's explanation was that this position came about because the Applicant failed to assist him in gaining access to certain files, referred to as the "crossover files". These were files, believed to be mainly conveyancing files, which – it appeared from what the Tribunal was told – were wrongly conducted by a former partner of the Respondent, Ms J, without the Respondent's knowledge.

55. The position appeared to be – and the Applicant did not dispute this – that for a period of about 3 months (from November 2005 to the end of January 2006) Ms J had operated another firm, H Law, whilst still in partnership with the Respondent. The partnership with the Respondent had been terminated at the end of January 2006, after the Respondent learned of the existence of H Law (which operated from the Firm's other office). Claims had been made against the Firm by late 2010 arising from two matters conducted by Ms J. In both, certificates of title had been signed in the name of the Firm but mortgage monies had been released to H Law's Bank. The Respondent was concerned that there might be other claims arising from matters of which he had no knowledge. These two claims had had the effect of making it difficult and expensive for the Respondent to obtain PII cover. The Respondent's position was that he had had to enter the ARP because he could not obtain cover on the open market for the indemnity year 2010/11. The same position had pertained at the beginning of the 2011/12 indemnity year, at which point the Respondent had sought and obtained permission to remain in the ARP for a further 6 month period.

56. The Respondent had then established a new firm, Caplans LLP, for which he obtained an affordable open market quote (with effect from 1 April 2012). However, in order

to put that insurance into effect the Respondent needed to have affordable "run-off" cover and have the "crossover files" risk assessed. The Respondent did not know where those files were; it appeared that Ms J's firm had closed during 2010 and she had not attended an arbitration hearing concerning the dissolution of her partnership with the Respondent which had taken place on 22 November 2010.

57. Amongst the documents submitted by the Respondent with his Response to the Rule 5 Statement was a "complaint" document dated 25 July 2012 in which he set out his complaint against the Applicant for failing to assist him in obtaining or locating the crossover files. It appeared from that document that the Respondent first raised the matter with the Applicant in a telephone conversation on 10 October 2011 and that there were further communications from the Respondent on 12 and 18 October 2011. On the latter occasion, the Respondent was advised to take advice from one of the solicitors on the Solicitors Assistance Scheme; the Respondent did so. The Respondent's position was that as he did not know Ms J's whereabouts and/or the whereabouts of the crossover files – and as he was aware that he had no entitlement to the files of H Law – the advice he was given (concerning issuing proceedings against Ms J for delivery up of the files) was not practical. Therefore, on 1 December 2011 he contacted the Applicant again stating that he was totally dependent on the Applicant to facilitate the provision of these files. By this time, if not before, the Respondent understood that H Law was being investigated by the Applicant and on 19 December 2011 the Respondent contacted the Applicant and informed the officer that there had been no progress with the H Law files and that he presumed the Applicant would be pursuing this matter. In any event, by 31 March 2012 the Respondent did not have the relevant files or know where they were. In short, the Applicant had not helped the Respondent in the way which he had hoped.

58. From an email which was read to the Tribunal dated 12 September 2012 – but which did not feature in the documents bundles – it appeared that the Applicant had known in or about October 2011 that the H Law files were in storage with a company but this information was not given to the Respondent at that point as the Applicant's database had not been updated. The Respondent told the Tribunal that he did not recollect that email or letter from the Applicant, but was not asserting he had not received it. In any event, it was clear that the Respondent had not been given any information by the Applicant concerning the whereabouts of H Law's files/the crossover files prior to 31 March 2012.

59. The Respondent asserted that as a result of the Applicant's failure to assist him he could not obtain affordable PII cover and he could not stay in the ARP. The Respondent had, throughout the proceedings, expressed his disquiet that the Applicant had failed to assist him in relation to what he believed to be the "rogue firm" of H Law. In particular, he asserted that if the Applicant had helped him at an early stage in locating the crossover files the position as to his insurance would have been retrieved and he would not have been in the position of practising without insurance.

60. There was no doubt that the Firm had continued to operate without insurance for the 48 days prior to the intervention decision and 52 days prior to the implementation of that decision. It was clear, and the Respondent accepted, that he was unable to pay the outstanding premiums. The Respondent's concerns about the Applicant's conduct

could therefore only be relevant to mitigation and not whether he had been in breach of the relevant rules and Principles.

61. Whilst the Tribunal was prepared to accept that the Applicant might have been more forthcoming about where the files were at an earlier stage, it appeared that there had been no intervention into Ms J's firm. Therefore, the files were not under the control of the Applicant. Their ability to help the Respondent was limited. The Tribunal further accepted that the Applicant was under no obligation to help the Respondent.

62. The Tribunal noted that the Respondent faced the practical difficulties that he did not know the whereabouts of the files or of Ms J, but he could have taken further action himself to trace both and to take proceedings if necessary to obtain access to the relevant files. The Tribunal noted in this regard that, according to the decision of the arbitrator in the partnership dispute, the Respondent had been aware by the time of that decision (November 2010) of two claims arising from crossover files and so was aware of the possibility of other claims – or the risk of such claims – about a year before he first sought assistance from the Applicant. Ms J had taken part in the arbitration proceedings until shortly before they were heard and so was at least potentially traceable at that point. The Tribunal further noted that in his oral evidence, the Respondent stated that he had tried to find out some information about Ms J by asking Ms C, who had worked with Ms J at H Law, but she did not know where Ms J was. In response to a question about the steps he had taken to trace Ms J, the Respondent confirmed that he had not instructed enquiry agents. The Tribunal understood that the costs of tracing Ms J and/or taking proceedings against her for delivery up/inspection of certain files may have been an issue, but it was not part of the Applicant's role, as a professional regulator, to solve the Respondent's problem.

63. Further, the Tribunal noted that in his own correspondence the Respondent had acknowledged that his problems with Ms J were not the only cause of his difficulty in obtaining affordable PII cover. In his letter to the Applicant dated 26 July 2011 (requesting a waiver) the Respondent stated:

> "I would also draw to your attention that one of the main reasons I was not able to obtain PI insurance on the open market last year was because of my claims' record. The most recent of these are the several caused by Ms H and her team at H Law…"

It was therefore clear that the Respondent had some difficulties arising from his Firm's claims record, not all of which was related to Ms J and H Law. In any event, the proximate cause of the Respondent's failure to pay the appropriate insurance premiums and to obtain PII was because of his lack of funds to sustain his practice.

64. The history of this matter as presented by the Respondent might be of some limited relevance in mitigation, but could not constitute a defence.

65. **Allegation 1.1 Failed to maintain professional indemnity insurance for his firm, contrary to Rules 4, 5 and 12 SRA Indemnity Insurance Rules 2011 ("the Indemnity Rules"), Principles 6, 7 and 8 of the SRA Principles 2011 ("the Principles") and Outcome O7.2 of the SRA Code of Conduct 2011 ("the Code")**

65.1 This allegation was admitted by the Respondent, together with the underlying facts. As noted above, the Respondent submitted that the Applicant's conduct was such as could provide complete mitigation and that no sanction should be imposed. As noted above, in particular at paragraphs 62 to 64, the Tribunal did not accept that submission.

65.2 The evidence was clear that the Firm had had no PII from 1 April 2012 and yet had continued to operate until the intervention, which was effected on 22 May 2012. This was a clear breach of the Indemnity Rules, as alleged. It was conduct which would diminish the trust the public would place in the Respondent and the profession, showed a failure to comply with legal and regulatory obligations and co-operate with the professional regulators and breached sound financial and risk management principles. Accordingly, the allegations of breaches of the Principles had been established. Further, it was clear that the Respondent did not have effective systems and controls in place to comply with all relevant Principles, rules and outcomes.

65.3 The Tribunal was satisfied to the required standard that the allegation had been proved, on the facts and on the admission.

66. **Allegation 1.2 - Conducted client matters and took new instructions after 31 March 2012 when he knew his firm to have no professional indemnity insurances, contrary to Principles 2, 4 and 5 of the Principles and Outcomes O1.2 and O1.8 of the Code**

66.1 This allegation was admitted by the Respondent. His submissions in relation to the circumstances which led to this position were as set out under paragraphs 54 to 59 above. It was further submitted that the Respondent had tried to arrange affordable PII cover, even after 1 April 2012 (as it was hoped such cover could be back-dated by a few days) in an attempt to save the business and the jobs of the staff. It was further submitted that there were no known claims arising within the uninsured period.

66.2 The Tribunal had found that the Firm had indeed continued to conduct client matters and had taken on 104 new client matters, which were primarily privately funded conveyancing matters and legally aided criminal matters. Over £16,000 was received into client account on account of costs in those matters. The Tribunal was satisfied that the Respondent's conduct showed a lack of integrity, a failure to act in the best interests of each client and a failure to provide a proper standard of service to clients. Further, in continuing and starting to act when the Firm had no insurance in place such that clients did not have the benefit of appropriate PII, the Respondent had failed to provide services to his clients in a manner which protected their interests.

66.3 The Tribunal was satisfied to the required standard that the allegation had been proved, on the facts and on the admission.

67. **Allegation 1.3 - Failed to notify clients that his firm was operating without professional indemnity insurances, contrary to Principles 2, 4 and 5 of the Principles and Outcomes O1.2 and O1.8 of the Code**

67.1 This allegation was admitted by the Respondent. His submissions in relation to the circumstances which led to this position were as set out under paragraphs 54 to 59 above.

67.2 In failing to notify existing and new clients that the Firm did not have appropriate PII, the Respondent prevented his clients from making an informed choice about whether or not to continue to instruct the Firm. The Tribunal was satisfied to the required standard that this allegation had been proved on the facts and on the admission.

68. **Allegation 1.4 - Failed to pay ARP premiums for the indemnity year 2010/11 and 2011/12 which he knew were required to be paid by 31 March 2012 contrary to Rule 10 of the Indemnity Rules, Principles 7 and 8 of the Principles and Outcome O11.2 of the Code**

68.1 This allegation was admitted by the Respondent. His submissions in relation to the circumstances which led to this position were as set out under paragraphs 54 to 59 above.

68.2 It was clear that the Respondent had failed to pay the sums due by 31 March 2012. He was clearly in breach of Rule 10 of the Indemnity Rules, Principles 7 and 8 of the Principles and had failed to pay monies which he was due to pay by the due date or at all. The Tribunal was satisfied to the required standard that the allegation had been proved on the facts and on the admission.

Findings relevant to the Rule 7 Statement allegations

69. The Respondent had admitted the factual basis of the allegations, which are set out at paragraphs 23 to 48 above. On the basis of the documents presented, the Tribunal found that all of the facts set out in those paragraphs were proved. Those general findings on the facts can be read into the specific findings on each allegation. The Tribunal considered also the evidence and submissions relevant to each particular allegations before making its findings on each allegation.

70. The Tribunal had the benefit of hearing from the Respondent in evidence in relation to the various matters which were alleged.

71. **Allegation 2.1 - He misled Royal National Institute for Blind People ("RNIB") (being a beneficiary in respect of a legacy of the residuary estate of Mrs MW) on 17 August 2012, by providing them with an inaccurate Will and/or Statement of Account for Mrs MW, which suggested that RNIB were due to receive a reduced legacy from the residuary estate in breach of all, alternatively any, of Principles 2 and 6 of the SRA Principles 2011 ("the Principles"). Further, or alternatively, the Respondent failed to achieve Outcome O11.1 of the SRA Code of Conduct 2011 ("the Code")**

71.1 This factual basis of the allegation was admitted by the Respondent but he denied that he was in breach of the Principles or the Code.

71.2 There was no doubt that the Will provided to RNIB under cover of the letter of 17 August 2012 was not the true Will, as produced to Probate and, indeed, copied to

St Dunstan's. Further, the effect of the incorrect Will and Account was to mislead RNIB – or anyone reading it – by indicating that RNIB was one of six equal residuary beneficiaries and therefore entitled to £101,083.76. This was the sum the Respondent had sent to RNIB under cover of a letter dated 25 January 2011.

71.3 The Respondent's explanation for this in his Response dated 12 December 2013 was,

> "He found and sent NLB what has turned out to be a photocopy of an earlier draft of the Will and an account based on this that he mistakenly believed to be correct."

71.4 The Respondent's position, as set out in the written submissions prepared by Mr Tunkel and in oral submissions, was that the Respondent was the sole Executor of the Will of Mrs MW, as admitted to Probate on 28 April 2010; this was not disputed by the Applicant. At that time, the Respondent was clearly practising at the Firm, as a sole practitioner. The Firm was intervened by a decision made on 18 May 2012. It was submitted that, thereafter, the Respondent was acting as Executor of the estate and not as a solicitor. He acknowledged that as Executor he had a duty to respond to RNIB and he had done so on 7 and 17 August 2012. The written submission indicated that the response, in particular the letter of 17 August 2012, was sent after the intervention and after the intervention agents had collected the Firm's files and ledgers. It was stated that the Respondent found and sent to RNIB a document that turned out to include photocopied pages from an earlier draft of the Will and a statement of account that he mistakenly believed to be correct, not having the Firm's files or ledgers available to check this. In short, the Respondent's explanation was that he had misled RNIB inadvertently and in his capacity as Executor and not as a solicitor or whilst holding himself out as a solicitor. Accordingly, it was submitted, he could not be in breach of any of the Principles or Outcomes as alleged.

71.5 The Tribunal noted these submissions carefully, but could not accept them. A solicitor, whilst on the Roll (as this Respondent was at all relevant times) was bound by the professional conduct rules and Principles. Whilst there might be a distinction to be drawn, in some situations, between conduct whilst clearly acting in the course of practice and actions in a solicitor's private life, it was wrong to suggest that the Respondent was not bound by the Principles (and therefore could not breach them) because he was also the Executor of the estate. A solicitor who committed theft unconnected with his or her work could be brought to account before the Tribunal as the conduct would damage the reputation of the profession as one in which the public could have confidence. The Tribunal was satisfied that whether or not the Respondent had been specifically acting as a solicitor at the relevant time, i.e. after the intervention, he was a solicitor and should conduct himself accordingly. Even if the Tribunal was wrong on that general principle, it was clear from the terms of Mrs MW's will that in appointing the Respondent as an Executor, she recognised his role as a solicitor; there was nothing to indicate she made the appointment as he was a relative or family friend. Whilst he may have instructed one of his employees to deal with much of the administration of Mrs MW's estate – for which work his Firm was entitled to charge under the appropriate provisions in the Will – it was clear that the Respondent had himself written letters in the name of the Firm, particularly to RNIB, in the course of the administration of the estate.

71.6 Having determined that the Respondent was, in all his dealings with Mrs MW's estate, bound to act in accordance with the relevant Code of Conduct and/or Principles, the Tribunal considered whether he was in breach as alleged.

71.7 Principle 2 requires a solicitor to act with integrity. The Respondent had acknowledged that he had sent an incorrect Will and Account to RNIB and had asserted that this was inadvertent. The Tribunal did not accept this. The Respondent had not, in his letter of 17 August 2012, indicated to RNIB that he was working without the full file or proper information, which he had asserted to the Tribunal was the position. He had presented the documents as if they were the correct documents. Further, the Tribunal found that in fact he had been in possession of the file (although it accepted he would not have had the client account ledgers available). Under cross examination, the Respondent stated that he had had papers in his capacity as Executor and that these remained in his possession; he confirmed that he had had sufficient papers to send a copy Will and Account. The Respondent told the Tribunal that the Will pages he had were loose, including the execution page; however, he had not informed RNIB that he was working from loose papers. Further, the Respondent had prepared the Accounts; he told the Tribunal that these were based on what he thought was the final Will. The Accounts as sent to RNIB matched the incorrect Will and the payment which the Respondent had sent to RNIB in January 2011; it was clear from all of the evidence that the Respondent had prepared the incorrect Account and, again, had not indicated that he was working from limited information – if that had indeed been the case. The Respondent had, in 2010, sent a correct payment for over £304,000 to St Dunstan's and yet in 2012 he sent RNIB an incorrect Will and Account which seemed to show that St Dunstan's had also been entitled to £101,083.76. For these reasons, together with the further matters set out in relation to allegation 2.4, the Tribunal was satisfied to the required standard that the Respondent had knowingly sent the incorrect Will and Account and thereby failed to act with integrity.

71.6 The Tribunal was further satisfied that in sending the incorrect Will and Statement of Account, the Respondent had clearly acted in a way which would not maintain the trust the public would place in him and/or the provision of legal services.

71.7 The Tribunal noted that Outcome 11.1 of the Code specified:

> "You do not take unfair advantage of third parties in either your professional or personal capacity".

This provision would therefore apply to the Respondent even if he had not been acting as a solicitor at the relevant time, as he was on the Roll. Sending the incorrect Will and Account gave the Respondent an unfair advantage as those documents appeared to show that he had carried out the administration of the estate correctly, when he had not done so. Also, but for the fact that RNIB had already seen a copy of the correct Will and Account, RNIB might have believed that they had received their full entitlement and proceeded to close their file.

71.8 The Tribunal was satisfied to the highest standard that all aspects of this allegation had been proved.

72. **Allegation 2.2 - He failed to account to RNIB for the balance of the legacy properly due to them from the residuary estate of Mrs MW in the sum of £204,676.44, in breach of Rules 1.02 and 1.06 of the Solicitors Code of Conduct 2007 ("the SCC") in the period up to 5 October 2011 and/or from 6 October 2011 he breached all, or alternatively, any of Principles 2, 6 and 10 of the Principles. Further, or alternatively, he failed to achieve outcome O11.1 of the Code**

72.1 The factual basis of this allegation was admitted by the Respondent. However, it was submitted that he was not in breach of the Rules, Principles or Outcomes alleged.

72.2 The Tribunal listened carefully to the detailed submissions on this point made by Mr Tunkel. In brief – and this summary notes what the Tribunal took to be the principal points – it was submitted that the Respondent owed duties to account in his capacity as Executor and not as a solicitor. The Respondent may have failed in his duties as an Executor in that he had not accounted to RNIB for £204,676.44 to which they were entitled as a residuary beneficiary but in his capacity as a solicitor he was under no duty in law to account to RNIB.

72.3 The Tribunal could not accept this argument. The Respondent was both the Executor and a solicitor who was bound by the relevant professional conduct rules. He had accepted that RNIB was entitled to a sum of £204,676.44 which he had failed to send to them – indeed, it was clear that the equivalent sum had been sent to HMRC rather than to RNIB. Whilst Mr Tunkel's analysis of the duties of Executors might well be correct, it did not address the Respondent's duties in professional conduct. The Tribunal considered carefully the various authorities relied on by Mr Tunkel, which included extracts from Williams, Mortimer and Sunnucks on Executors, Administrators and Probate (20th edition) and in particular paragraphs 57.04-57.06 and 81.02. The Respondent could not be absolved of his responsibilities as a solicitor when he had clearly failed to fulfil his duties as either solicitor or Executor.

72.4 For reasons set out more fully below in relation to allegation 2.4, the Tribunal was satisfied that the Respondent's conduct was deliberate. Failing to account to a residuary beneficiary for a significant sum to which that beneficiary was entitled lacked integrity and was conduct which would reduce the trust the public would place in the Respondent and the profession. Under Principle 10 of the Principles, the Respondent was under a duty to protect client money and assets. He had clearly failed to do this. Mrs MW had intended half of her residuary estate to go to a charity she had chosen; the Respondent failed to deal with her money and assets and her intention was thwarted. The Tribunal noted that there was a technical argument that, as the Executor, the Respondent was himself a client of the Firm and that Mrs MW's estate had vested in him. However, the Tribunal could not accept that the Respondent could avoid his professional responsibilities simply by virtue of becoming the sole Executor (when the Will had provided for two Executors).

72.5 The Tribunal was satisfied to the highest standard that this allegation had been proved in all of its aspects.

73. **Allegation 2.3 - He misappropriated client monies and in so doing acted contrary to Rules 1.02 and 1.06 of the SCC.**

73.1 This allegation was denied by the Respondent.

73.2 The Respondent's position as set out in the skeleton argument was that "a cheque to RNIB for £204,676.44 became confused with a cheque to HMRC, both of which were shown as debited to the estate." This was explained as an error by the Firm's book-keeper, for which the Respondent accepted responsibility. It was denied that making a payment to HMRC rather than RNIB amounted to a misappropriation as the Respondent asserted that it arose from an error and not a deliberate act.

73.3 All of the evidence showed clearly that £204,676.44 from the client account relating to Mrs MW's estate had been paid to HMRC and not to a residuary beneficiary. It had not been possible for either party to obtain information from HMRC to show the purpose of the payment, or the account to which it had been applied.

73.4 It was submitted for the Respondent that if there had been a mistake in paying HMRC instead of RNIB, the charity should be able to trace the money; unless the money was in respect of a liability of the estate, it was submitted, RNIB could recover it from HMRC as "money had and received." Mr Tunkel referred the Tribunal to a passage in Snell's Equity (32nd edition), in particular paragraph 30-050 and Lipkin Gorman v Karpnale Ltd [1991] 3 WLR 10.

73.5 The fact that the residuary beneficiary may have a remedy and be able to recover the sum due did not alter the fact that in 2010 money due to the charity had been sent to HMRC and banked. For reasons set out more fully below, the Tribunal was satisfied that the Respondent had acted deliberately in making the payment. Even if this were not the case, however, the Tribunal determined that it was possible for funds to be misappropriated by mistake; a deliberate and conscious act was not required, although in this instance the Tribunal was satisfied there had been a conscious decision by the Respondent to misdirect the funds.

73.6 In sending funds to HMRC when those funds were not due from the estate of Mrs MW – and the Tribunal was satisfied to the required standard that there was no liability on the estate to pay any such sum – the Respondent had acted without integrity and in a way which would diminish the trust the public would place in him and the profession. Accordingly, the Tribunal was satisfied to the highest standard that this allegation had been proved.

74. **Allegation 2.4 - Although dishonesty was not an essential ingredient of the allegations, it was alleged that the Respondent was dishonest in respect of allegations 2.1, 2.2 and 2.3 in that:-**

2.4.1 By letter dated 17 August 2012 he provided a copy of a Will dated 18 July 2007 and Statement of Account to RNIB, which were materially different to the documents submitted to Probate and provided to the other residuary beneficiary, St Dunstan's; and/or

2.4.2 He failed to account to the RNIB for the balance of the legacy due to them under the Will submitted to Probate in the sum of £204,676.44; and/or

2.4.3 He misappropriated client's funds, in that he made a payment by cheque dated 23 July 2010 in the sum of £204,676.44 to HMRC from funds held in relation to the estate of the late Mrs W.

74.1 This allegation was denied, in all its respects, by the Respondent.

74.2 In considering the allegation of dishonesty, the Tribunal applied the combined test set out in Twinsectra v Yardley and others [2002] UKHL 12 and reminded itself that the highest standard of proof was to be applied.

74.3 In determining the question of dishonesty, the Tribunal noted the chronology of relevant events and admitted facts as set out at paragraphs 23 to 48 above. It also determined that at all material times the Respondent was a solicitor and was bound by the rules and professional standards applicable to all members of the profession. The Respondent's argument that he had been acting as an Executor and not as a solicitor, in particular after the intervention into his Firm, could not be accepted; it was clearly wrong and unsupportable. In any event, only the matters mentioned under allegation 2.4.1 above related entirely to any event after the intervention.

74.4 The Tribunal took into account the Respondent's dealings with RNIB throughout the relevant period. In particular, it noted the Respondent's failure to communicate in any way with RNIB concerning its entitlement under Mrs MW's Will from the date of death, 14 December 2009, until he wrote to them on 25 January 2011. This was in the context that the Respondent was the Executor of the estate and that RNIB had first written to him/the Firm on 21 July 2010. The Tribunal noted that a letter to RNIB informing them of their entitlement, dated 13 July 2010, had apparently been drafted by the fee-earner, SM, but had not been sent. That draft letter appeared to be entirely proper, in that it referred to the total sum due (£304,676.44) and referred to enclosing a copy of the Will and statement of account. The Respondent, as Executor and sole principal of the Firm had not ensured that an estate for which he was responsible was being administered properly. The Respondent's explanation was that the estate was being dealt with by an experienced fee earner and he left everything to her and he thought she was dealing with the estate. On the Respondent's own evidence, he opened the post and so should have seen the letter from RNIB dated 21 July 2010; on his own case he did nothing to check that the estate was being administered properly and in particular did nothing to ensure that he or his Firm communicated with one of two residuary beneficiaries. The Respondent put the failure to communicate with RNIB down to a failure of supervision. The Tribunal could not accept that as a plausible explanation. Rather, it appeared from the client matter file that the fee earner had prepared an entirely proper letter to enclose RNIB's entitlement. Whilst it could not determine exactly why the letter had not been sent – when the other beneficiary had been sent an appropriate cheque and estate accounts in July 2010 – there did not appear to be any reason to criticise the fee earner. The Respondent could offer no explanation for why the letter had not been sent out as drafted.

74.5 When the Firm did communicate with RNIB, by way of a letter dated 25 January 2011, the Respondent sent to RNIB a cheque for £101,083.76. This was not the total to which they were entitled, but was one-third of the sum due to them (or one-sixth of the sum available for distribution to the residuary beneficiaries). The letter itself

contained a number of strange features. Firstly, it was written by the Respondent himself and bore his reference, whereas most letters concerning the estate bore the reference of the fee earner, SM. The letter was in minimal terms, being less than one line in length (see paragraph 34 above). It failed to acknowledge the earlier communication from RNIB, did not explain the delay in responding, did not provide any information about the estate, did not provide a copy of the Will, the estate accounts or any calculation to justify the amount of the payment. The Respondent's only explanation for all this was that the payment was made by reference to an earlier Will which, it was suggested, had provided for RNIB to receive one-sixth of the residuary estate. This was notwithstanding the fact that, on his own evidence, the Respondent had drafted Mrs MW's Will and the Firm had obtained probate of the correct Will – and sent the correct amount to the other residuary beneficiary.

74.6 The Respondent was then chased by RNIB for a copy of the Will and the estate accounts for a period of approximately 18 months, during which time the RNIB wrote to the Firm on seven occasions. The Respondent's evidence to the Tribunal was that he would have passed the letters to SM to deal with; he could give no explanation for why RNIB's correspondence had gone unanswered save that he had not supervised properly and some matters had slipped through. The Tribunal noted in this regard that the only reference RNIB had at the Firm was that of the Respondent, as they had never received anything written by SM, and all of the RNIB's letters from 4 February 2011 gave as the Firm's reference "Richard Caplan".

74.7 There was no response by the Respondent or the Firm to RNIB's chasing letters until he wrote on 7 August 2012 referring to the closure of the Firm and stating that he would revert to RNIB. Thereafter, on 17 August 2012 the Respondent sent to RNIB what purported to be a copy of the Will; that document did not reflect the proved Will but did justify the payment made to RNIB in January 2011. The Respondent's explanation was that the incorrect Will was sent in error as he had come across a copy of an earlier Will (or possibly a draft Will) and that the sheets had not been stapled together and so had become muddled. The Tribunal found that the attestation of the incorrect Will and that of the Will were identical; it appeared that a photocopy of the correct attestation and execution page had been stapled by the Respondent to pages which suggested that RNIB was entitled to one-sixth of the residuary estate. The estate accounts which accompanied the incorrect Will were also erroneous, but again supported the amount which had been paid to RNIB in January 2011.

74.8 On or about 22 May 2012 the SRA intervened into the Respondent's Firm. As noted above, the estate file remained in his possession and it was from this that the Respondent drew the incorrect Will and estate accounts. The Respondent told the Tribunal he had retained the file as the intervention agent had failed to take up the file from his office; he felt entitled to keep it and deal with the file as the Executor. The Respondent did not acknowledge in his evidence that he was under a duty to draw the file to the attention of the intervention agents and hand it over, although he must have known that he was obliged to do so.

74.9 It was of significance that prior to sending the cheque to RNIB on or about 25 January 2011 the Respondent had sent to the other residuary beneficiary, St Dunstan's, the correct amount due (£304,676.44) with copies of the correct Will and estate accounts. This was done on 23 July 2010. On the same date a cheque for £204,676.44 was

drawn from the estate monies and paid to HMRC. This was £100,000 less than the sum due to RNIB. The Respondent's position, in his Response, submissions and in evidence was that this came about because of a mistake by his book-keeper. The Respondent was able to offer no explanation about how this mistake had come about, what the payment to HMRC was for or why the payment was made from the estate monies. A copy of the paid cheque was in the hearing bundle. The Respondent accepted in evidence that the cheque was written out by him and signed by him. The Tribunal noted, and found it to be significant, that the cheques to St Dunstan's and to HMRC were drawn on the same day and on consecutive cheque numbers. The Respondent told the Tribunal he could not explain why, when the relevant cheque request chit referred to a payment being required to RNIB/NLB, he had written out the cheque to HMRC. That cheque bore a stamp which was not easy to read but appeared to read, "Insolvency Service". There was no covering letter on the estate file sending the cheque or referring to it. The Respondent put all of these errors down to a failure of supervision on his part – for which he accepted responsibility. He could not explain or recall what the cheque to HMRC was for, telling the Tribunal that the cheque had been written some three and a half years before the hearing. The Respondent had made enquiries of HMRC but he was unable to provide any information from HMRC on the purpose of the payment or to what account it had been applied by HMRC.

74.10 At paragraph 10 of his written statement, the Respondent stated he,

> "… paid the legacies and prepared and sent cheques to NLB for £204,676.44 on 12/7/10, to St Dunstan's for £304,676.44 on 30/8/10, to NLB for £100,000 on 4/11/10 (which was stopped on 21/1/11) and to NLB for £101,083 on 25/1/11, all in accordance with the final Will."

He did not explain why the full amount due to RNIB/NLB was not paid at the same time as the payment to St Dunstan's although they were equal beneficiaries, nor did he explain the reason for the stopped cheque.

74.11 The Applicant produced to the Tribunal the ledger for this client matter, as reconstructed and prepared by the intervention agents from records they held. The accuracy of this ledger was not challenged by the Respondent. It showed the cheque drawn in favour of HMRC being entered and re-credited on the same day and another cheque for the same amount drawn in favour of NLB/RNIB. The Respondent could offer no explanation for this. In any event, it appeared on the face of the ledger that a payment had been made to NLB/RNIB when in fact the payment was made to HMRC.

74.12 It was some six months later that the Respondent sent the letter of 25 January 2011, referred to at paragraph 34 above, with a cheque for £101,083.76 being the balance due to the NLB after taking account the £204,676.44 (which had in fact been paid to HMRC) and the additional interest of £1,083.76 (as mentioned at paragraph 42 above).

74.13 The Tribunal noted a document within the hearing bundle which had not been put to the Respondent and accordingly could not be given much weight, although it appeared to support the overall picture of events which had emerged during the

hearing. This document was a different version of the letter of 25 January 2011 to that which had actually been received by RNIB and it, not the version sent to RNIB, appeared on the client matter file. This version of the letter, which bore the Respondent's reference, read,

> "Further to our telephone conversation we now hasten to enclose our further cheque in your favour for £101,083.76."

This would give the impression to anyone reading the file that: a) the Respondent had spoken to someone at RNIB (although this did not appear to be the case according to any of the documents at that point from RNIB); b) the Respondent had sent a cheque to RNIB at some earlier point. As noted, this was not put to the Respondent and was therefore not used to determine any issue.

74.14 The Respondent's explanations, in so far as he had given any, for this chain of events were not credible. He had tried to put the "errors" which had occurred down to mistakes by others, whom he had failed to supervise properly. However, there was nothing on the papers to suggest any mistake or error by the fee-earner, SM; that fee-earner had not sent out any misleading or inaccurate information or any cheques paid to the wrong body. The nature of the error the Respondent alleged had been made by the book-keeper had been unexplained; there was no doubt that the cheque request chit referred to NLB/RNIB and that the Respondent had written out and signed a cheque to HMRC instead. The failure to respond to correspondence from RNIB – all of which correspondence bore the Respondent's name or reference, rather than that of the fee-earner – had allowed the Respondent's misdirection of estate funds to HMRC to remain undetected for about two years. Sending an incorrect Will and estate accounts had been a further attempt to cover up the fact that money had been diverted from RNIB to HMRC. There was no information from HMRC which would prove the purpose to which the sum of £204,676.44 was applied but it was beyond doubt that the estate was not due to pay that amount.

74.15 Taking into account the chain of events, as set out at paragraphs 23 to 48 and the Tribunal's findings at paragraphs 74.4 to 74.14, the Tribunal was satisfied that the Respondent's actions, over a long period, were driven by a dishonest intent.

74.16 The Tribunal was satisfied to the highest standard that in: a) providing a copy Will and statement of account to RNIB under cover of the letter of 17 August 2012 which were materially different to the documents submitted to Probate and to the other residuary beneficiary; and b) failing to account to RNIB for the sum of £204,676.44 properly due to that charity; and c) misappropriating client funds by making a cheque payment on 23 July 2010 in the sum of £204,676.44 to HMRC from the estate of the late Mrs MW the Respondent had been dishonest by the standards of reasonable and honest people. The Tribunal was further satisfied that in taking steps to conceal the misapplied payment (such steps including failing to respond to correspondence or answer reasonable enquiries and then providing incorrect documents to RNIB which appeared to show RNIB had received all the sums due to them) the Respondent knew that his behaviour was dishonest by those same standards. The Respondent had been an unreliable witness, unable to provide explanations which had any credibility, for the chain of events from July 2010 up to and including August 2012. He had wrongly applied money to make a payment to HMRC instead of paying it to RNIB as he was

required to do. The allegation had been proved, in all its aspects, to the highest standard of proof.

Previous Disciplinary Matters

75. There was one previous matter in which findings had been made against the Respondent.

76. In matter 8922/2003, heard on 10 June 2004 (Findings dated 20 July 2004) the Tribunal imposed a fine of £10,000 and ordered the Respondent to pay costs of £12,500. The Tribunal found that the Respondent had: compromised or impaired his independence or integrity and his good repute and that of the solicitors' profession (or was likely to do so), through his involvement in the promotion of a "cashback" scheme in 1999; caused or permitted public statements to be made about his practice that were inaccurate or misleading, contrary to the provisions of the Solicitors Publicity Code 1990; acted towards others in a manner that was contrary to his position as a solicitor in that he gave misleading or inaccurate information to another solicitor and to Mr L.

Mitigation

77. Mr Tunkel, on behalf of the Respondent, submitted that he had no other mitigation to offer, i.e. in addition to the points made in relation to determination of the allegations.

Sanction

78. The Tribunal had regard to its Guidance Note on Sanctions (September 2013).

79. The Tribunal noted that the allegations dealt within the Rule 5 Statement were themselves serious. In particular, the Respondent had practised without insurance – and, indeed, had taken on new matters when he did not have insurance – and so had exposed clients to risk. As noted at paragraph 61 above, the Tribunal had some sympathy for the frustrating situation in which the Respondent had been in late 2011/early 2012 but his disregard for his clients' best interests could not be overlooked.

80. The Tribunal noted that the Respondent had on a previous occasion been found to have behaved in a manner unbefitting a solicitor; he was not, therefore, of previous good character and in the light of the previous findings and the seriousness of the admitted and proved allegations in the Rule 5 Statement, the Tribunal would have had to consider the imposition of a significant sanction.

81. More fundamentally, however, the Tribunal had made a finding of dishonesty, in relation to three allegations. There were no exceptional circumstances which could justify departing from the usual consequence of a finding of dishonesty, which was the imposition of a striking-off order. Given the facts of this matter, there was no other sanction which would be appropriate or proportionate.

82. A charity had been deprived of £204,676.44 properly due to it under the Will of Mrs MW and the Respondent had taken steps over a considerable period of time to cover

up the fact he had misused the estate's money. He had been dishonest in such a way that a charity had been deprived of a substantial sum properly due to it. The Respondent's conduct was therefore very damaging to the reputation of the Respondent and the profession and only a striking-off order could be appropriate in these circumstances.

Costs

83. The Applicant sought an order for costs to be paid by the Respondent and submitted a schedule of costs totalling over £23,000 including VAT (where relevant) and investigation costs. Mr Goodwin submitted that although one allegation had been withdrawn (in the Case Management Hearing on 8 October 2013), all of the allegations had been properly brought. The decision to withdraw one allegation had been reasonable as new information had become apparent after the proceedings were issued and the Respondent had provided his explanation. It was submitted that the Applicant, as the professional regulator, should not fear adverse costs orders in cases which were properly brought. In response to a question about VAT on the Applicant's costs the Tribunal was told that the Applicant claimed VAT on costs where work was outsourced, e.g. the work done by Mr Goodwin, but not on internal costs, e.g. the investigation costs.

84. Mr Goodwin submitted that the Tribunal should make a costs order in the usual form, but in the light of the Respondent's means the Tribunal might consider making an order for any costs not to be enforced without the Tribunal's permission.

85. Mr Tunkel submitted that having the costs made subject to detailed assessment had no merit, as it would involve throwing good money after bad. Whilst there were no particular comments in relation to the rates claimed, Mr Tunkel submitted that as one of the five allegations made in the Rule 5 Statement had been withdrawn there should be some discount to reflect this.

86. Mr Tunkel submitted that the Respondent was presently in an Individual Voluntary Arrangements ("IVA"), in which one of the supporting creditors was the Applicant (in relation to the intervention costs of over £119,000). It was submitted that everything the Respondent had had gone into the IVA and that the only impact of a costs order would be on the other creditors, as the Respondent was unable to pay.

87. The Tribunal considered the schedule of costs and determined that in all the circumstances of the case, including the Respondent's financial circumstances and the fact that one allegation had been withdrawn during the course of the proceedings, the appropriate and proportionate amount of costs was £21,000, inclusive of VAT. The Tribunal noted that the Applicant is not VAT registered, but pays VAT to external solicitors or agents and so VAT was chargeable on part of the costs incurred. The Tribunal also noted the evidence that the Respondent was unable to pay due to the IVA and determined that, whilst the Respondent should be ordered to pay costs of £21,000, those costs should not be enforced without the Tribunal's permission.

Statement of Full Order

88. The Tribunal Ordered that the Respondent, RICHARD CAPLAN, solicitor, be STRUCK OFF the Roll of Solicitors and it further Ordered that he do pay the costs of and incidental to this application and enquiry fixed in the sum of £21,000 inclusive of VAT, not to be enforced without permission of the Tribunal.

DATED this 31st day of March 2014
On behalf of the Tribunal

D. Glass
Chairman